IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 143.

VERNA LEIB SUTTON,
Plaintiff-Appellant,

vs.

R. WELLS LEIB,
Defendant-Appellee.

PETITION FOR REHEARING.

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Now comes the Plaintiff-Appellant, Verna Leib Sutton, and respectfully prays that a rehearing in this cause be granted.

GROUNDS FOR REHEARING.

Upon March 3, 1952, this Honorable Court, in an opinion by Mr. Justice Reed, reversed the judgment of the Court of Appeals for the Seventh Circuit, and remanded the proceedings with directions to determine the amount of defendant-appellee's liability to plaintiff-appellant under the Illinois law. This rehearing is sought by plaintiff-appellant, despite this Court's ruling in her favor, in order, first, that the opinion may be rewritten to avoid uncertainty in certain aspects which may otherwise arise in

future litigation before this Court; second, to request this Court to make an express determination as to plaintiff-appellant's rights in view of the following matters:

I. It is not necessary to require the Court of Appeals to determine the Illinois rule as to the effect of a bigamous remarriage. The Illinois law is settled upon that question, and this Court's opinion can and should adhere to that result under Erie v. Tompkins, 304 U. S. 64.

II. Illinois, in view of its holdings, is not restricted to the date of the New York annulment decree. It holds a bigamous marriage void ab initio, not necessitating a decree of annulment to declare it so.

III. It follows, therefore, under the Illinois rule, that an alimony obligation is not interrupted by the void remarriage, and that defendant's duty to pay alimony continued under the Illinois decree, and did not merely rearise by virtue of the New York decree of annulment.

IV. By referring to a possible difference in result as to the rights of "strangers" to a decree, this Court has created an apparent inconsistency with its decision in Johnson v. Muelberger, 340 U. S. 581.

SUGGESTIONS IN SUPPORT OF REHEARING.

The learned opinion of this Court clarifies the legal effect of divorce proceedings in a "quick divorce" state not having jurisdiction over both parties to such action, and we are in entire accord with this Court's conclusion as to that matter. However, we believe that some of the language of the opinion may lead to uncertainty in future cases arising in this Court, and could also result in the loss of substantial rights to the present plaintiff. Doubtless this is our fault for not stating more clearly, in our briefs, the Illinois rule. The principal misapprehension arises from the following statement of this Court in its opinion.

The opinion states: "Mrs. Sutton relied upon the New York annulment decree as determining that her Nevada marriage was void" (Opinion, p. 1).

This is quite correct, in part. We relied also upon the New York decree in the Henzel proceedings declaring the invalidity of the Nevada divorce decree (Tr. 27). And we went on to point out (Appellant's Brief, pp. 18, 19):

> "A provision discharging a man from alimony obligations upon remarriage of his former wife contemplates that a woman is not ordinarily entitled to support from two husbands at the same time. When a new husband's obligation of support commences, the former husband's obligation terminates. But if the new marriage is wholly void, so that the new spouse does not become liable for such support, a different rule must follow, for two reasons. One is that such provision for the termination of alimony never contemplated a release from liability except by the substitution of someone to take over the support obligation. Second, is the rule of public policy which envisions that the woman might otherwise become a ward of the state."

This Court has now cast back upon the Court of Appeals the duty "to consider the effect of the annulment under the law of Illinois on the respondent's alimony obligation" (p. 9). We believe this is an unnecessary task, for the reasons hereafter discussed.

The Illinois law is already settled to the effect that such a bigamous remarriage is void ab initio. If this be true, the void act could have no effect of interrupting defendant's obligation to pay alimony; and if no decree of annulment was necessary to clarify the legal situation, or to destroy the apparent status resulting from the remarriage, then the date of the New York annulment decree is imma-

terial. Illinois has stated, in such a situation: "Being a nullity, no decree is necessary to void the same." Cartwright v. McGown, 121 Ill. 388, at 395, 12 N. E. 732. We would conclude, from this, that Illinois does not regard the void remarriage as an act even temporarily lifting the defendant's obligation; and we conclude further that the annulment proceedings were, actually, not necessary. Clearly, the fact that plaintiff sought an annulment declaration to clarify her status would give the defendant no new or additional rights under the Illinois decree which required him to pay alimony. Surely no one would contend that a marital status between plaintiff and Henzel continued to exist following the New York adjudication of the invalidity of the Henzel divorce (June 22, 1945; Tr. 29) and the date of the annulment decree (June 6, 1947; Tr. 33). Nor, if the Nevada divorce decree was a nullity, can it be any more reasonably contended that Henzel was validly married to two women simultaneously at any time.

Illinois has also stated, in a similar case of marriage to one whose purported Nevada divorce did not free him from a former marriage: "The invalidity of the marriage of the parties to this proceeding was an established fact since its very inception." Jardine v. Jardine, 291 Ill. App. 152, 9 N. E. (2d) 645. To the effect that this is the general law, see 38 Corpus Juris 1291, 1295—"* * * no judicial decree is necessary to establish its invalidity."

This Court has already pointed out the distinction between this situation and that presented in Lehmann v. Lehmann, 225 Ill. App. 513 (Opinion, p. 10), where the second marriage is actually valid in all states other than Illinois. Where a remarriage is valid and confers new duties upon a new spouse, it is evident that the former husband should be relieved of responsibility. But when the second marriage is absolutely void as against public policy—i. e., bigamous—it is the same as if it had never

occurred. If we correctly understand this Court's opinion, all states must hold such remarriage void from its very inception. For the validity of such remarriage, ipso facto, depends upon jurisdiction in the divorcing state over the nonappearing spouse. Since there was no jurisdiction in Nevada over Dorothy Henzel, the divorce decree was void, Henzel lacked legal capacity to remarry, and the remarriage ceremony was inefficacious for any purpose.

If this is not the effect of the opinion, and if we ascribe to it a greater holding than was intended thereby, it should be rewritten for greater clarity. But, if we are correct, then there is no need for the Court of Appeals to consider how Illinois regards such a situation when its holdings are clear. Illinois would not and could not legally measure the period of defendant's obligation from the date of the annulment decree—since it holds no annulment necessary—but, rather, from the date defendant's obligation initially arose. Otherwise, if plaintiff had not sought or procured an annulment, however necessary such action, defendant's duty would never have rearisen.

To us, our view represents correct law. Of course, we have a selfish interest in urging this position. Otherwise, plaintiff may have won a Pyrrhic victory. She has gained legal recognition of her rights, but may possibly lose the money owing to her from defendant, if the Illinois law be misconstrued. This would be a hollow conquest, at best. But, apart from this personal aspect, any other result—that is, of holding something to be "nothing" in law (a "nullity", Tr. 27, 33) and yet of permitting it to destroy vested rights—would not only be a manifest inconsistency but it would be unjust. It would deprive the plaintiff of property without due process of law. Surely, neither a legally invalid act (such as the remarriage) nor a legally unnecessary act (such as the annulment) can be considered "the due process of law."

This Court has made one further statement which disturbs this Counsel deeply. It is that "Illinois is free to decide for itself the effect of New York's declaration of annulment on the obligation of respondent, a stranger to that decree" (Opinion, p. 8). Your Honors, even if the rights of my client were not here involved, I should be gravely concerned over this language. It is, I feel, a breeding ground of future controversy, a Pandora's box with the lid tilted slightly by this language. Exactly what will be the result? Each state would be given discretion to heed or to ignore as little or as much of the decree of another state as it sees fit—provided only that some new or different party appear in such proceedings. For example, take the defendant here. Certainly he was a stranger to the bigamous remarriage. Yet he seeks to claim the benefit of that act to which he was a stranger, and to disavow the detriment of the various judicial acts which declared the invalidity of such ceremony (such as the Henzel decree in New York in 1945, Tr. 27) to which he was also a stranger.

This language is particularly unfortunate in that this Court had only recently pointed out in concise language that persons other than the parties to the proceedings are concluded by the decree of a court, under the full faith and credit requirement. In Johnson v. Muelberger, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411, this result was held to apply to the children of persons involved in such a controversy. Shall such decrees have any lesser effect when a divorced husband is involved?

CONCLUSION.

For the above reasons, we respectfully urge that a rehearing in this cause be granted and the parties directed to file briefs upon the particular questions here raised, in order that complete justice may be effected between the parties, and that such changes may be made in the opinion

as may be necessary for a complete clarification of these issues.

Respectfully submitted,

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CERTIFICATE OF COUNSEL IN SUPPORT OF PETITION FOR REHEARING.

(Original on file in office of Clerk.)

State of Illinois, } ss.
Champaign County. }

John Alan Appleman, being first on oath duly sworn, deposes and says that he is Counsel for Verna Leib Sutton, petitioner in the petition for rehearing filed in this Court, and hereby certifies that the said petition for rehearing of this cause is presented in good faith, and not for delay.

John Alan Appleman.

Subscribed and sworn to before me by John Alan Appleman this 11th day of March, A. D. 1952.

Marie R. Taylor,
Notary Public—Champaign County, Illinois.

(Seal)